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August 20, 2004

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: CC Docket No. 04-6 – *Ex Parte* Communication Concerning ASAP Paging, Inc.
Petition for Preemption**

Dear Secretary Dortch:

Yesterday, John Jones of CenturyTel, Inc., Jeffrey Marks of this office and I met with Tamara Preiss, Victoria Schlesinger, and Monica Desai of the Commission's Wireline Competition Bureau, Pricing Policy Division regarding issues raised in the above-captioned Petition for Preemption ("Petition") filed by ASAP Paging, Inc. ("ASAP"). We discussed the issues set forth below, and provided them with a map depicting the relevant telephone exchanges, attached hereto as Exhibit A.

I. BACKGROUND

In its Petition ASAP requests that the Commission preempt the reasoned determination by the Texas Public Utilities Commission ("Texas PUC") that it is lawful for CenturyTel of San Marcos, Inc. ("CenturyTel") to charge its own local exchange customers a toll charge for calls from San Marcos, Texas to ASAP's facilities in Austin, Texas. The dispute surrounds calls to NPA-NXX codes that ASAP obtained as a CMRS carrier. ASAP uses these codes for its paging customers and, as CenturyTel later learned, to serve ISP customers. Although the NPA-NXX codes at issue correspond to locations within CenturyTel's extended local calling service ("ELCS") area established by Texas law, *all* calls made to the numbers at issue actually are routed outside of CenturyTel's ELCS area to ASAP's facilities in Austin. As such, in accordance with CenturyTel's state tariff, CenturyTel's local exchange customers pay toll charges to call ASAP numbers just as they would for any other call to the Austin exchange.

After 18 months of proceedings, including a full evidentiary hearing, the Texas PUC ruled in favor of CenturyTel. Because ASAP's paging customers can receive service anywhere the United States, and because the one-way nature of ASAP's paging service provides is no indication of the actual location of the customer when paged, the Texas PUC held that it was appropriate to use ASAP's Austin switch as a proxy for customer location.¹ The Texas PUC also found it

¹ See Order, PUC Docket No. 25673, SOAH Docket No. 473-02-2503, Texas Public Utilities Commission, at 7 (Oct. 9, 2003) (attached as Exhibit 1 to Petition) ("*Texas PUC Final Order*") ("[T]he Commission finds that the geographic location of the calling customer and the called customer is the appropriate factor for differentiating toll

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appropriate to treat ISP-bound calls as calls to Austin, because ASAP's ISP customers interconnected at ASAP's Austin switch.² Moreover, the Texas PUC found that insofar as ASAP provides interconnection services to ISPs, it is a "telecommunications utility" under Texas law and must register with the Texas PUC.³

II. PROCEDURAL POSTURE OF ASAP'S CLAIMS

The Commission is one of three venues in which ASAP has attempted to re-argue its claims after the Texas PUC ruled that CenturyTel acted lawfully. First, after ASAP's petition for reconsideration at the Texas PUC was denied, on October 30, 2003, ASAP filed a petition for judicial review of the Texas PUC's ruling in state court, asserting, among other things, that the Texas PUC misinterpreted state and federal law and that the Texas PUC's holdings were not supported by the evidence presented.

Second, on December 22, 2003, ASAP filed its preemption petition with this Commission. Comments were due to the Commission by March 23, 2004 and Reply Comments were due April 23, 2004.

On August 10, 2004, ASAP filed a Motion to Abate in the state court proceeding, requesting that the state court delay its decision pending resolution of the federal Petition for Preemption filed with the Commission. CenturyTel is scheduled to file its Reply to the Motion to Abate on August 24, 2004, and plans to oppose the motion. CenturyTel expects that the merits of ASAP's appeal will be fully briefed and presented to the court by the end of 2004.

Third, on March 31, 2004, ASAP filed a federal antitrust claim in federal district court based on substantially the same facts under which it filed its complaint at the Texas PUC. On July 19, 2004, the district court dismissed the complaint for failure to state a claim.⁴ ASAP has since filed an appeal to the Court of Appeals for the Fifth Circuit. The Fifth Circuit has not yet set a briefing schedule.

III. ASAP'S PETITION FAILS TO PROVIDE A BASIS FOR FEDERAL PREEMPTION

In its Petition and Reply Comments, ASAP presents the Commission with supposition regarding various potential future scenarios, but provides scant discussion of why

calls from ELCS calls in this case. The Commission concludes that, for purposes of ELCS, when a CenturyTel customer calls an ASAP ISP, the ISP, which is located in Austin, is the called customer. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS. In the same fashion, the Commission finds that, for purposes of determining whether a paging call is an ELCS or toll call under the specific facts of this case, CenturyTel's customers are calling ASAP's paging service at ASAP's mobile telephone switching office located in Austin. Therefore, calls to these ASAP NPA-NXXs from CenturyTel's customers in San Marcos are outside of the ELCS calling area and may not be rated as ELCS").

² *Id.*

³ *Id.* at 4.

⁴ *ASAP Paging, Inc. v. CenturyTel of San Marcos, Inc.*, slip. op., Case No. A-04-CA-181-SS (D. Tex. Jul. 16, 2004).

preemption is appropriate under federal law. Indeed, although ASAP claims to seek preemption, it fails to present any legal basis for preemption in its Petition and relegates its argument for why “preemption is required under every theory” to only two paragraphs in its 39-page Reply Comments.

Rather, ASAP improperly seeks “preemption” on issues that were not even decided by the Texas PUC. The Texas PUC’s holdings were narrow, based on the traditional right of the state to designate which calls are local under state law, and whether it is lawful for CenturyTel to charge its own local exchange customers toll charges for calls to the NPA-NXX’s obtained by ASAP. Notwithstanding these narrow findings, ASAP focuses its Petition on a series of hypothetical outcomes regarding what it alleges CenturyTel “intends”⁵ to do or “will not do”⁶ related to interconnection with ASAP. ASAP also posits what the Texas PUC “wants” ASAP to do related to interconnection.⁷ However, issues related to interconnection and intercarrier compensation were explicitly *not* before the Texas PUC.⁸

ASAP wants CenturyTel to afford special treatment to calls to ASAP customers, and specifically to permit CenturyTel’s customers to make calls into the ASAP paging network or to ASAP’s ISP customers in Austin at a different rate than that which applies under CenturyTel’s tariff. Despite ASAP’s protestations, ASAP currently pays nothing to CenturyTel for these calls, and neither CenturyTel nor the Texas PUC has required any action by ASAP relating to interconnection. The only question even arguably before the Commission is whether federal law prohibits CenturyTel from charging toll rates to its San Marcos customers when they make a non-local call to an ASAP paging customer, the same toll rates that apply to San Marcos customers when they make other calls rated as non-local under state law. As explained in CenturyTel’s Opposition to the Petition,⁹ even as to this question, ASAP fails to establish a basis for preemption, and its Petition should be denied.

IV. ASAP’S REPLY COMMENTS INCLUDE A NUMBER OF INCORRECT FACTUAL STATEMENTS

ASAP’s Reply Comments include factual assertions which are incorrect or otherwise misleading. CenturyTel responds to some of these errors herein. First, ASAP displays a fundamental misunderstanding of ELCS. In its Reply Comments, ASAP states that “CenturyTel takes the position that it can apply, or waive, any of these [toll] requirements at its whim”¹⁰

⁵ ASAP Reply Comments at 3.

⁶ *Id.* at 32.

⁷ *Id.* at 4.

⁸ Proposal for Decision, PUC Docket No. 25673, SOAH Docket No. 473-02-2503, State Office of Administrative Hearings, at n.72 (Apr. 23, 2003) (“*Proposal for Decision*”) (the Texas Administrative Law Judge’s Proposal for Decision on which the Final Order was based explicitly states that the decision “applies only to retail rating of calls and not to carrier interconnection agreements or intercarrier compensation issues, which are not before the [Texas PUC] in this proceeding”).

⁹ Opposition of CenturyTel of San Marcos, Inc. at 8-23.

¹⁰ *Id.* at 3, 6.

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Whether or not ELCS applies to telephone calls between two communities, however, is not CenturyTel's choice.¹¹ ELCS is a creation of Texas statute, with very explicit guidelines for implementation.¹² Specifically, the statute provides that customers within an exchange may petition the Texas PUC for ELCS between two central switching offices if certain conditions are met.¹³ Upon grant of an ELCS petition, the affected carriers must not charge toll rates for calls between the applicable exchanges, but the affected carriers impose a monthly fee on all subscribers served by the relevant local switching centers, so the carriers can recover forgone toll revenues. ELCS has not been established between San Marcos and Austin. Therefore, by law, calls from CenturyTel's San Marcos Exchange to Austin are toll calls, and the law does not provide CenturyTel authority to "apply" or "waive" toll charges for such calls.¹⁴

Second, ASAP's repeated proclamations that it has established a "virtual POI" in San Marcos through an "informal arrangement with SBC" is wholly unsubstantiated.¹⁵ CenturyTel has contacted SBC regarding this issue, and SBC has denied that any such arrangement exists. Similarly, ASAP's claim that CenturyTel does not incur additional transport costs for delivering traffic to Austin is incorrect. CenturyTel and SBC share the Feature Group C trunk over which the two companies route traffic between San Marcos and Austin, and both companies invested in additional trunking facilities to handle the increased traffic to serve ASAP's customers. Further, SBC has informed CenturyTel that, in the event CenturyTel were to transport local calls to the SBC Austin tandem, SBC would seek to charge CenturyTel transiting costs for use of SBC's tandem switch and for transport even though CenturyTel would cease to collect toll compensation from its own customers or access from the interexchange carrier. In any event, the question of CenturyTel's incremental costs in this instance is a red herring. Pursuant to state law, all calls from San Marcos to Austin are toll-rated. The state could decide (as ASAP appears to suggest) that all traffic between San Marcos and Austin should be treated as "local," but then the state surely would be forced to substantially increase local rates to compensate CenturyTel for the decreased toll revenues and increased transport and switching costs that CenturyTel would incur.

Third, ASAP incorrectly claims that the Texas PUC's decision would require ASAP to establish a point of interconnection ("POI") in San Marcos and to "prove" "on a call by call

¹¹ CenturyTel concedes that, due to an error by a CenturyTel employee, it initially rated calls to ASAP as local. Opposition of CenturyTel at 5. CenturyTel did not have discretion to continue to rate these calls as local; its state tariff, consistent with state law, required that CenturyTel toll rate the calls at issue.

¹² *Texas PUC Final Order* at 17.

¹³ PURA § 55.047.

¹⁴ Related to this, it is unclear what ASAP expects to gain by challenging the fact that ELCS is a "special arrangement." See ASAP Reply at 2, 11-12, 15. The "special arrangement" nomenclature refers merely to the fact that ELCS is a creation of state statute that is established between two LEC switching offices in communities for which local calling would not normally apply. The Commission recently held that ELCS is a "traditional local service," but did not dispute that it also is "a special arrangement." *Request for Limited Modification of LATA Boundaries to Provide ELCS Between the Jackson Exchange and the Tyler Exchange*, WC Docket No. 04-77, DA 04-1726, ¶ 7 (rel. June 17, 2004).

¹⁵ ASAP Reply Comments at 4, 13, 24.

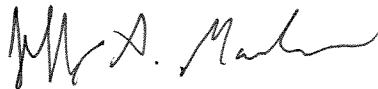
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basis” that its customers are located in San Marcos.¹⁶ As stated above, ASAP’s future potential actions are beyond the scope of its Petition. CenturyTel has offered alternatives to ASAP, to which ASAP has not responded.¹⁷ In any event, ASAP’s claim is contrary to the record at the Texas PUC. For the purpose of determining whether calls from CenturyTel’s end users to an ASAP paging customer are local or toll, the Texas PUC held that the location of ASAP’s *switch* was the proper proxy for the end user’s location, the only logical conclusion on the facts presented in the record before it as to the nature of ASAP’s one-way paging service. Consistent with this, the Commission recognized in its *Local Competition Order* that “LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.”¹⁸ Presumably, this approach could also apply to the NPA-NXXs at issue in the event that ASAP establishes a POI with CenturyTel in San Marcos.

V. CONCLUSION

For the forgoing reasons and for the reasons set forth in CenturyTel’s Opposition and Reply Comments filed in this proceeding, CenturyTel urges the Commission to deny the Petition. Please direct any questions concerning this matter to the undersigned.

Very truly yours,



Karen Brinkmann
Jeffrey A. Marks
Counsel for CenturyTel of San Marcos, Inc.

Attachment: Exhibit A (Local Calling Area of CenturyTel of San Marcos, Inc.)

cc: Tamara Preiss, Pricing Policy Division, Wireline Competition Bureau
Victoria Schlesinger, Pricing Policy Division, Wireline Competition Bureau
Monica Desai, Pricing Policy Division, Wireline Competition Bureau

¹⁶ *Id.* at 3, 6, 29.

¹⁷ See Reply Comments of CenturyTel of San Marcos, Inc. at 6.

¹⁸ Consistent with this, the Commission recognized in its *Local Competition Order* that “LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.” *Texas Proposal for Decision* at 44 (quoting *Local Competition Order* at ¶ 1044) [emphasis supplied in *Texas Proposal for Decision*].

EXHIBIT A

